Supreme Court, U.S.
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No. 97-1181

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

RICHARD M. PARKER, *et al.*,
Petitioners,
v.
DAVID S. WAKELIN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. ESTABLISHMENT OF A CONTRACTUAL RELATIONSHIP

Petitioners' request for review of the first question presented—*i.e.*, whether and under what circumstances employees who are members of a state retirement system acquire a right to retirement benefits that is protected by the Contracts Clause when the state legislature has not expressly addressed the matter—is bottomed on two basic propositions. The first proposition is that this Court's decision in *Pennie v. Reis*, 132 U.S. 164 (1989), is squarely in conflict with modern Contracts Clause jurisprudence (Petition ("Pet.") at 9-10); the second proposition is that there is significant conflict among the state courts of last resort and federal courts of appeals that have addressed this question of federal law (Pet. at 11-16). In their Brief in Opposition ("Opp. Br."), respondents do not take issue with either of these propositions, but attempt to explain why they do not provide adequate basis for this Court to grant review.

As we demonstrate in Parts A and B below, respondents' efforts in this regard fall short—and in some respects serve only to confirm the need for guidance from this Court. In Part C, we address—and refute—respondents' remaining contention that review is not warranted because this case is controlled by a single provision of the Maine State Retirement System ("MSRS"), and a ruling by this Court "would not be likely to provide useful guidance to state and lower federal courts elsewhere in the nation." Opp. Br. at 17.

A. *Pennie v. Reis*: Respondents acknowledge that *Pennie* "hold[s] that state statutes establishing retirement benefits can never create contractual rights," Opp. Br. at 14, that this holding is no longer good law, *id.* at 13-14,

and that *Pennie* never explicitly has been overruled. *Id.* But, say respondents, because *Pennie* has not "been judicially accorded any controlling effect, one might well question whether this Court should grant certiorari to revisit a 109 year old decision that no longer appears to be given any independent weight as precedent." *Id.* at 11-12. Implicit in this question is the suggestion that the precedents of this Court lose their controlling effect with the passage of time, or, even worse, because they have been ignored by the lower courts. But this suggestion is directly contrary to *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), *Agostini v. Felton*, 117 S.Ct. 1997, 2017 (1997), and other cases, which establish that this Court reserves to itself the prerogative of overruling its own decisions, and unless and until this Court does so, all other courts are bound to apply that existing precedent.

Presumably recognizing that their threshold argument would undermine this important prerogative, respondents assert that *Pennie* in any event "has been *superseded* by the analysis set forth in [*National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451 (1985)], which [unlike *Pennie*] does not foreclose the possibility that contract rights can be created but requires a clear showing that the Legislature intended to create such rights." Opp. Br. at 14 (emphasis added). Respondents are simply wrong in suggesting that *Atchison* has implicitly "superseded" *Pennie*. While *Atchison* suggests a framework for dealing with the general question of whether legislative enactments create contract rights, it did not involve a state retirement system, or even a Contracts Clause challenge to a state statute. In short, *Atchison* is not a direct precedent, and as this Court recently reaffirmed in *Agostini*, "if a precedent has direct application in a case [*i.e.*, *Pennie*], yet appears to rest on some reasons rejected in some other line of decisions [*i.e.*, *Atchison*]," the lower courts are bound to "follow the case

which directly controls." 117 S. Ct. at 2017 (internal quotation marks omitted).[1]

What is more, *Atchison* says nothing at all about the question presented here, which is whether a statute that offers retirement benefits to potential employees in order to induce them to work for government reveals a legislative intent to enter into a unilateral contract for the provision of such benefits. That is the question answered in the negative by *Pennie* and the court below, and in the affirmative by the majority of state courts of last resort and the Ninth Circuit. This Court should grant review to resolve this dispute.

B. *Conflict Among State Courts of Last Resort and Federal Courts of Appeal*: Once again, respondents do not take issue with the basic proposition that informs this aspect of our request for review, conceding that there is substantial conflict among state courts of last resort and federal courts of appeals in regard to whether and when a state retirement system creates a contractual relationship that comes within the ambit of the Contracts Clause. "The problem with this argument," according to respondents, "is that the diversity of approaches . . . results either from differences in the relevant state statutes involved or from differences in state contract law itself . . . [and] it is not this Court's role to harmonize the rulings of state courts of last resort on issues that are primarily based on state law." Opp. Br. at 10. Respondents are mistaken as to the reason for this diversity, and, in turn, as to the role of this Court.

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[1] Respondents suggest that "guidance" as to the first question presented by the Petition also can be found in *Dodge v. Board of Educ.*, 302 U.S. 74 (1937). Although *Dodge* did involve the question of whether a state retirement system created a contractual relationship, we are aware of no court or secondary legal authority that has interpreted *Dodge* as "supersed[ing]" *Pennie*, Opp. Br. at 14, or that has attempted to harmonize the two decisions. Indeed, to the extent that this Court's 61-year-old decision in *Dodge* is in tension with its 109-year-old decision in *Pennie*, the case for granting review is that much stronger.

1. Although respondents attribute the diversity of approaches to "differences between the relevant state statutes," Opp. Br. at 14, they make no attempt to support this contention by an analysis of the decisions themselves. And, in fact, such an analysis reveals that the vast majority of state court decisions do not turn on the specific language of the statute in question, but rather reflect the particular court's view of how general principles of contract law should apply to state employee retirement systems. *See* cases cited in Pet. at 12-15, including by way of illustration, *Police Pension & Relief Bd. v. Bills*, 366 P.2d 581, 583 (Colo. 1961) (relying upon an "ever growing school of judicial thought"); *Public Employees' Ret. Bd. v. Washoe County*, 615 P.2d 972, 974 (Nev. 1980) (relying upon "the modern and better-reasoned view [of pension benefits])"; *Wagoner v. Gainer*, 279 S.E.2d 636, 642 (W. Va. 1981) (relying on "the great weight of modern authority").

2. Nor are respondents on firmer ground in attributing the diversity of approaches to "differences in state contract law." This is so for two reasons. First, although respondents emphasize this Court's observation in *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992), that federal courts should "accord respectful consideration and great weight to the views of the State's highest court" in determining whether a state statute creates contractual rights that are subject to the Contracts Clause, *see* Opp. Br. at 15, they fail to reference the more critical language from *Romein*, which directly follows the quoted sentence:

> We accord respectful consideration and great weight to the views of the State's highest court, though ultimately we are bound to decide for ourselves whether a contract was made. The question whether a contract was made is a federal question for purposes of Contract Clause analysis, and whether it turns on issues of general or purely local law, we can not surrender the duty to exercise our own judgment.

503 U.S. at 187 (citations and internal quotation marks omitted). Because we are dealing here with a federal

question, it must be answered on the basis of uniform principles enunciated by this Court, and "differences in state law"—to extent that they exist, *see infra*—cannot be dispositive.

Second, and perhaps more important, respondents have misstated the relevant cases: it simply is not true that nuances in the law of contracts of individual states explain the divergent approaches that have been adopted. As the cases cited in the Petition indicate, most state courts of last resort have relied on general principles of contract law, as reflected in precedents from sister states and in secondary legal authorities. *See* cases cited in Pet. at 12-13.

C. Guidance to Courts Elsewhere in Nation: Respondents contend that review is not warranted in this case because they believe that the dispositive question is how to interpret a statutory provision—5 M.R.S.A. § 17801—that is "unique to Maine's retirement statute," and, "[a]s a result, any ruling in this case by this Court would not be likely to provide useful guidance to state and lower federal courts elsewhere in the nation." Opp. Br. at 17. This contention rests on a far too narrow reading of the First Circuit's decision, and misapprehends the quarrel that petitioners have with that decision.

To be sure, the court below viewed § 17801—which prohibits a reduction in retirement benefits that "would be due to a member"—as the critical statutory provision, and ruled against petitioners because it interpreted that provision as creating contractual rights at most only for those teachers to whom benefits were "currently payable," Pet. App. at 15a—*i.e.*, those already retired. *See* Pet. App. at 16a. But the First Circuit interpreted § 17801 as it did—and rejected the alternative interpretation made by the district court—because the court below concluded that the unmistakability doctrine applied, and it did "not think this language [in § 17801] could be said to reflect the unmistakable intent of the Maine legislature" to create

contractual rights for active members of the system. Pet. App. at 16a. The question presented by the Petition is not simply whether the First Circuit "erred in interpreting section 17801," Opp. Br. at 19, *within this analytical framework*—which it plainly did—but whether this is the appropriate analytical framework to use in determining whether a state retirement system creates a contractual relationship for purposes of the Contracts Clause. It hardly warrants extended discussion to demonstrate that the answer to this latter question will "provide useful guidance to state and lower federal courts elsewhere in the nation." *Id.* at 17.

II. THE UNMISTAKABILITY DOCTRINE

The second question presented for review—which involves the propriety of the analytical framework referenced at the end of Part I *supra*—has two parts. The first part asks whether the unmistakability doctrine applies in determining whether and when contractual rights sufficient to trigger Contracts Clause analysis arise under a state retirement system; the second part assumes, *arguendo*, that the unmistakability doctrine *does* apply, and asks whether that doctrine restricts a court solely to an examination of the statutory language, and bars inquiry into the history, purpose, and circumstances surrounding enactment of the statute. The considerable confusion reflected in the Opposition Brief with regard to both of these points confirms the need for such clarification.

A. Applicability: Petitioners cite this Court's recent decision in *United States v. Winstar*, 116 S. Ct. 2432 (1996), for the basic principle that the unmistakability doctrine applies in determining whether and when contractual rights arise *only* if the exercise of a "sovereign power" of government is involved. Respondents do not take issue with this principle, *see* Opp. Br. at 10-11, but they fail to understand what it means with regard to state retirement systems generally, and to this case specifically.

Respondents contend initially that *Winstar* is not on point because it "involved a case where there was no doubt that a contractual relationship existed—the government had entered into a written contract, and the issue was whether it could alter that contract through subsequent legislation." Opp. Br. at 19-20. In contrast, they say, "this case involves a somewhat different issue—whether where no written contract exists, a statute should be construed as itself creating a contractual relationship." *Id.* at 20. There is to be sure a factual difference between the two cases, but respondents miss the legal point. In both *Winstar* and the instant case, government made certain commitments: in the former case, a promise by a government agency that goodwill and capital credits could be counted toward the capital reserve requirements imposed by federal regulations, 116 S. Ct. at 2447; and here, a promise by the legislature to provide specific retirement benefits to potential employees in order to induce them to accept employment. Both cases pose the question of whether the unmistakability doctrine should apply in determining whether the initial promise created the type of contractual relationship that, under the Contracts Clause, government cannot unilaterally change by a subsequently enacted statute.

As *Winstar* makes clear, the answer to this question depends not—as respondents would have it—on whether the initial promise was made by a state agency or by the state legislature, but rather on "the different kinds of obligations the government may assume and the consequences of enforcing them." 116 S. Ct. at 2457. As Justice Souter's plurality opinion explains, the dispositive question is whether "enforcement of the contractual obligation alleged would block the exercise of a *sovereign power* of the Government," *id.* at 2457 (emphasis added), which Justice Souter identifies as a "power peculiar to the Government," such as the power "to tax or control navigation." *Id.* This Court concluded in *Winstar* that the power of government to determine whether goodwill and capital credits could

be counted toward the capital reserve requirements imposed by federal regulations did not fall into this category. *Id.* at 2447. We submit that when government, acting in its capacity as an employer, establishes a state retirement system, it likewise is not exercising a "power peculiar to the Government."

Respondents disagree. Rather than focusing on the substantive nature of the obligations involved (*e.g.*, promulgating capital reserve requirements, or establishing a state retirement system), respondents instead posit a formalistic rule pursuant to which the applicability *vel non* of the unmistakability doctrine depends on the particular mechanism that government uses in making the initial promise. Thus, respondents assert that "[t]he exercise of legislative power has uniformly been found to constitute a sovereign governmental act," Opp. Br. at 20, which leads them to conclude that the unmistakability doctrine applies to *any statutory promise regardless of the subject matter to which it relates*. But this cannot be, if, as this Court has held, applicability of the doctrine turns on "the different kinds of obligations the Government may assume and the consequence of enforcing them," 116 S.Ct. at 2457, and the dispositive question is whether compliance with the alleged obligations "will require the exercise (or not) of a power peculiar to Government." *Id.* This Court should grant review in order to resolve this dispute as to the teaching of *Winstar*.

B. *Inquiry Into History, Purpose, and Circumstances*: Assuming, *arguendo*, that the unmistakability doctrine applies in determining whether and when contractual rights arise under a state retirement system, the second part of the question presented is whether the doctrine allows a court to look beyond the naked statutory language, and consult other sources, such as the history, purpose, and circumstances surrounding enactment of the statute, in order to ascertain the "unmistakable" intent of the legislature. Respondents concede that the answer is yes, Opp.

Br. at 22, but they characterize as "demonstrably untrue," *id.* at 23, our contention that the First Circuit erred by "focus[ing] solely on statutory language in applying the unmistakability doctrine." *Id.* Once again, respondents' analysis indicates that there is a need for clarification as to how this undisputed legal principle is intended to operate in practice.

In the paragraph from the decision of the court below that is cited by respondents, *see* Opp. Br. at 23, the First Circuit rejects the district court's interpretation of 5 M.S.R.S. § 17801—which was based largely on an examination of the relevant legislative history. Pet. App. at 32a-35a. The court below observes that "even if this is a possible reading, we do not think this *language* could be said to reflect the unmistakable intent of the Maine legislature, particularly when the legislature could very well have indicated as much." Pet. App. at 16a (emphasis added). The court then references the legislative history that was relied on by the district court, *id.*, but concludes that, such history notwithstanding, "the language of section 17801 remains at best ambiguous, and we cannot find that the legislature as a whole unmistakably intended to create contract rights . . . . especialy where, as here, it would have been easy to make any such intention crystal clear." *Id.* Elsewhere in its decision, the First Circuit poses the question of "whether section 17801 should be read to protect a teacher—and possibly to create contract rights—whenever a teacher satisfies the service requirements even though the teacher is still in active service and no pension is currently payable." *Id.* at 15a. Despite its acknowledgment that the language could be considered "ambiguous," the court answers this question in the negative without reference to the legislative history, the purpose of the statute, or the circumstances surrounding its enactment, because the language of "Section 17801 does not clearly compel such a reading, since 'due' could easily be read to mean currently payable." Pet. App. at

15a. This is a misapplication of the unmistakably doctrine, which warrants review by this Court.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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